Supreme Court of the United States

October Term 1946

No. 1119

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS. CORPORATION
Respondent

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS. CORPORATION
Respondent

PETITION FOR REVIEW ON WRIT OF CERTIORARI

[redacted]

Supreme Court of the United States

OCTOBER TERM 1946

No.

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS. CORPORATION
Respondent

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS. CORPORATION
Respondent

PETITION FOR REVIEW ON WRIT OF CERTIORARI

Considering itself aggrieved by the final decision of the United States Circuit Court of Appeals for the first circuit in the above entitled actions, your petitioner, the City of Franklin, New Hampshire, by its counsel, prays that a writ of certiorari in the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

STATEMENT OF THE MATTER INVOLVED

In these proceedings Coleman Bros., Corporation, a Massachusetts corporation duly established by law, is seeking from the City of Franklin, a municipal corporation duly established under the laws of the State of New Hampshire, the sum of twelve thousand two hundred fifty-seven dollars ($12,257.00) which it

alleges has been unlawfully and illegally collected by the City of Franklin on personal property situated on land owned by the Government of the United States. Specifically this sum represents assessments against the respondent corporation for the years 1940 and 1941. The above entitled cause was instituted in the District Court for the District of New Hampshire on May 17, 1944. Prior to trial your petitioner seasonably moved for a dismissal of the action on the ground that the court lacked jurisdiction of the subject matter.

In the spring of 1940, the petitioner's assessors presented an inventory to the respondent's agent in New Hampshire, requesting the same be completed for the purpose of an assessment. The respondent corporation refused and it returned said inventory with a letter as follows:

"We believe after due investigation, that our equipment on our job at Franklin, N. H., is not taxable by the City of Franklin because of the fact that we are performing construction work on a United States Army Reservation." Finally an inventory was filed accompanied by a protest.

On August 1, 1940, the respondent corporation was notified of the tax assessment and subsequently it sent a check to the petitioner together with a letter of protest dated November 22, 1940 (Transcript of Record, Page 107, Exhibit No. 19A).

A protest was also written on the inventory filed for the year 1941 and again the respondent corporation was notified of the tax assessment on August 1, 1941. On November 17, 1941, the respondent forwarded its check in payment for taxes assessed by the petitioner's assessors accompanied by a letter of protest (Transcript of Record, Page 108, Exhibit 22A).

There is no evidence of restraint nor of seizure; in fact, the collector's conduct consisted simply of mailing the tax notices to the respondent corporation. (Transcript of Record, Pages 110-111, Exhibits 22A-23). The witnesses for the respondent asserted

they did not, nor did they know anyone else on behalf of the Coleman Bros., Corporation to ever file a petition for abatement in accordance with the laws of the State of New Hampshire or to ever institute an action against the petitioner as the result of either or both assessments or as the result of any payments of the demanded taxes.

There is no evidence of any demand having been made for a refund of moneys paid to the City of Franklin other than the institution of the present action.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States is invoked under the Judicial Code, section 240 (U.S.C.A. Title 28, section 347).

The action was instituted in the District Court for the District of New Hampshire and a final judgment was entered by direction of said Court on the 2nd of January, 1945, (Transcript of Record, pages 8 through 17).

Cross-appeals were taken to the United States Circuit Court of Appeals for the First Circuit (docket numbers 4085 and 4086). A decision from said Court was rendered on December 13, 1945. A motion by the City of Franklin to extend the time for filing application for certiorari to the United States Circuit Court of Appeals for the First Circuit was granted on March 13, 1946 extending the time within which to file said petitions for certiorari to and including April 15, 1946.

The District Court for the District of New Hampshire found that the statutory remedy in New Hampshire in cases of illegal assessment or over-assessment is exclusive and further found that the Coleman Bros., Corporation failed to fulfill the requirements of the laws of New Hampshire. The Statute referred to is New Hampshire Revised Laws, Chapter 77, sections 13 and 14:

"13. By Selectmen. Selectmen, for good cause shown, may abate any tax assessed by them or by their predecessors. All applications for abatement shall be in writing.

14. By Court. If they neglect or refuse so to abate, any person aggrieved, having complied with the requirements of chapter 75, may, within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires."

However, inasmuch as the petitioner, City of Franklin, had no jurisdiction of the corporation or of the property of the respondent, said Court rendered a verdict for the respondent corporation in the sum of twelve thousand two hundred fifty seven ($12,257.00) dollars, the amount paid by the respondent corporation, without interest. (58 Fed. Supp. 551)

The petitioner, the City of Franklin, requested the District Court to find that it had not consented to be sued nor have the statutes provided for such a suit as the instant case. The Court

was in accord with said request but it allowed the respondent corporation to remain in the Federal court under the theory that the City of Franklin had received money illegally obtained under the guise of a tax. (Transcript of Record, page 15)

The District Court did not grant the petitioner's, the City of Franklin, motion that (1) the payments made by the respondent corporation were voluntary and (2) the respondent corporation was estopped by its own conduct and was therefore guilty of laches.

Cross appeals were taken to the United States Circuit Court of Appeals for the First Circuit (Docket numbers 4085 and 4086). On December 16, 1945, a decision was rendered (152 Fed (2nd) 527) affirming the judgment of the District Court in favor of the respondent corporation and allowed interest on the verdict. (Transcript of Record, pages 115 to 124)

The decision of the United States Circuit Court of Appeals for the First Circuit contended that the respondent corporation had a remedy by abatement, of New Hampshire Revised Laws, Chapter 77, sections 13, 14 supra; however, such was not its exclusive remedy. Said decision held the payments on the part of the respondent corporation to have been involuntary and that it had seasonably brought its action.

QUESTIONS PRESENTED

The petitioner, the City of Franklin, contends that the United States Circuit Court of Appeals for the First Circuit erred in failing to decide:

(1) The statutory remedy (N. H. Rev. Laws, Chapter 77, Sections 13-14) to refund of taxes wrongfully collected is exclusive.

(2) That the action was not maintainable in Federal Court; that the City of Franklin had not consented to be sued; that the statutes do not provide for suits as presented in the instant case.

(3) That the payments made by the respondent, Coleman Bros., Corporation, to the petitioner, the City of Franklin, were made voluntarily.

(4) That the respondent, Coleman Bros., Corporation, is estopped by its own conduct and is therefore guilty of laches.

(5) That the respondent, Coleman Bros., Corporation, is entitled to interest.

The questions to which petition for certiorari is sought are of great public concern to the State of New Hampshire and are of grave importance to the City of Franklin; and they involve a conflict of decisions between the Circuit Courts of Appeal and the Supreme Court of the State of New Hampshire.

For and on account of the above reasons, the petitioner, the City of Franklin, prays that a writ of Certiorari, from the judgment of the United States Circuit Court of Appeals for the First Circuit hereinbefore described in the above entitled cause, be issued.

CITY OF FRANKLIN

BY 

F. A. Normandin
489 Main Street
Laconia, N. H.

Lawrence J. Bernard
John E. Shea
1025 Connecticut Ave., N. W.
Washington 6, D. C.

SUBJECT INDEX

INDEX OF CASES

Statutes

Supreme Court of the United States

OCTOBER TERM, 1946

No.

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS., CORPORATION
Respondent

CITY OF FRANKLIN
Petitioner

v.

COLEMAN BROS., CORPORATION
Respondent

This case is one in which the respondent corporation is seeking to recover from the petitioner the sum of twelve thousand two hundred fifty seven ($12,257.00) dollars which it alleges has been unlawfully and illegally collected by the petitioner on assessment of taxes on personal property situated on land of the United States of America. Specifically this sum represents assessments against the personal property of the respondent corporation for the years 1940 and 1941.

The cause was instituted in the District Court for the District of New Hampshire on May 17, 1944.

The District Court for the District of New Hampshire rendered a decision on December 29, 1944, and judgment was entered by direction the 2nd day of January, 1945; said decision is reported in 58 Federal Supplement 551. (Also, Transcript of Record, Pages 8 to 16)

Cross appeals were taken to the United States Circuit Court of Appeals for the First Circuit (Docket numbers 8045 and 8046). On December 13, 1945, a decision by said Court was rendered and the same is reported in 152 Federal (2nd) 527. (Transcript of Record, Pages 114 to 125.)

An extension within which to file a petition for writs of certiorari was granted March 13, 1946, extending the same to and including April 15, 1946.

JURISDICTIONAL STATEMENT

Jurisdiction of the Supreme Court of the United States is invoked under Judicial Code, Section 240 (U. S. C. A. Title 28, Section 347). The questions with respect to which petition for certiorari is sought are of great public concern for the people of the State of New Hampshire and also of grave importance to the City of Franklin; and, they involve a conflict of decisions between the United States Circuit Court of Appeals and the Supreme Court of New Hampshire.

STATEMENT OF THE CASE

In these proceedings Coleman Bros., Corporation, a Massachusetts corporation duly established by law, is seeking from the City of Franklin, a municipal corporation duly established under the laws of the State of New Hampshire, the sum of twelve thousand two hundred fifty-seven dollars ($12,257.00) which it alleges has been unlawfully and illegally collected by the City of Franklin on personal property situated on land owned by the Government of the United States. Specifically this sum represents assessments against the respondent corporation for the years 1940 and 1941. The above entitled cause was instituted in the District Court for the District of New Hampshire on May 17, 1944. Prior to trial your petitioner seasonably moved for a dismissal of the action on the ground that the court lacked jurisdiction of the subject matter.

In the spring of 1940, the petitioner's assessors presented an inventory to the respondent's agent in New Hampshire, requesting the same be completed for the purpose of an assessment. The respondent corporation refused and it returned said inventory with a letter as follows:

"We believe after due investigation, that our equipment on our job at Franklin, N. H., is not taxable by the City of Franklin because of the fact that we are performing construction work on

a United States Army Reservation." Finally an inventory was filed accompanied by a protest.

On August 1, 1940, the respondent corporation was notified of the tax assessment and subsequently it sent a check to the petitioner together with a letter of protest dated November 22, 1940 (Transcript of Record, Page 107, Exhibit No. 19A).

A protest was also written on the inventory filed for the year 1941 and again the respondent corporation was notified of the tax assessment on August 1, 1941. On November 17, 1941, the respondent forwarded its check in payment for taxes assessed by the petitioner's assessors accompanied by a letter of protest (Transcript of Record, Page 108, Exhibit 22A).

There is no evidence of restraint nor of seizure; in fact, the collector's conduct consisted simply of mailing the tax notices to the respondent corporation. (Transcript of Record, Pages 110-111, Exhibits 22A-23). The witnesses for the respondent asserted they did not, nor did they know anyone else on behalf of the Coleman Bros., Corporation to ever file a petition for abatement in accordance with the laws of the State of New Hampshire or to ever institute an action against the petitioner as the result of either or both assessments or as the result of any payments of the demanded taxes.

There is no evidence of any demand having been made for a refund of moneys paid to the City of Franklin other than the institution of the present action.

Questions Presented

The petitioner, the City of Franklin, contends that the United States Circuit Court of Appeals for the First Circuit erred in failing to decide:

(1) The statutory remedy (N. H. Rev. Laws, Chapter 77, Sections 13, 14) to refund of taxes wrongfully collected is exclusive.

(2) That the action was not maintainable in Federal Court; that the City of Franklin had not consented to be sued; that the statutes do not provide for suits as presented in the instant case.

(3) That the payments made by the respondent, Coleman Bros., Corporation, to the petitioner, the City of

Franklin, were made voluntarily.

(4) That the respondent, Coleman Bros., Corporation, is estopped by its own conduct and is therefore guilty of laches.

(5) That the respondent, Coleman Bros., Corporation, is not entitled to interest.

Argument

STATUTORY REMEDY FOR RECOVERY OF MONEY WRONGFULLY COLLECTED AS TAXES FOR THE STATE OF NEW HAMPSHIRE IS EXCLUSIVE

The United States Circuit Court of Appeals for the First Circuit ascertained that Coleman Bros., Corporation clearly had a remedy under New Hampshire Revised Laws, Chapter 77, Sections 13 and 14, which reads as follows:

> "13 By Selectmen. Selectmen, for good cause shown, may abate any tax assessed by them or by their predecessors. All applications for abatement shall be in writing.
>
> 14 By Court. If they neglect or refuse so to abate, any person aggrieved, having complied with the requirements of Chapter 75, may, within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires."

The Court, however, concluded that inasmuch as the City of Franklin had no jurisdiction of the respondent corporation nor of its property the remedy under the New Hampshire Law for the recovery of money wrongfully collected was not exclusive. In this respect, there is a conflict between the Supreme Court of New Hampshire and the Circuit Court of Appeals.

The New Hampshire Court has stated repeatedly: "The decision in *Edes* v. *Boardman* (1879) established the rule which has ever, since been followed that as to 'any error correctible on appeal' the remedy is exclusive" . . . Cases before *Edes* v. *Boardman* held that one who has paid a tax illegally assessed may recover it back from the town in an action of assumpsit. That decision established for this jurisdiction the rule that the remedy by petition for abatement abolished the common law action to recover back taxes."

Bretton Woods Co. v. *Carroll* (1930), 84 N. H. 428, 429
Edes v. *Boardman* (1879), 58 N. H. 580.

The statute in question is not confined to cases of overvaluation, but applies alike to cases where the whole assessment is illegal.
Savings Bank v. *Portsmouth,* 52 N. H. 17
Perley v. *Dolloff,* 60 N. H. 504
Locke v. *Pittsfield,* 63 N. H. 122
Rowe v. *Hampton,* 75 N. H. 479
Kaemmerling v. *State,* 81 N. H. 405

In *Nottingham* v. *Newmarket Mfg. Company* (1930), 84 N. H. 419, the defendant, a foreign corporation, had nothing of value unless there was interest in certain indentures. One of the questions raised: whether the defendant had any taxable property. The court ruled that the defendant's remedy was by petition for abatement. The question whether the defendant has taxable estate is not open in this suit.

In another instance wherein there was no jurisdiction to impose any tax at all, may be found in *Canaan* v. *Enfield Village Fire District,* 74 N. H. 8. An assumpsit action was brought to recover the amount of a tax assessed upon the property of the defendant located in Canaan which was purchased pursuant of legislative authority. The defendant contended it was exempted from taxation. In the course of its decision, the court stated: "If the property was not taxable, or the tax was excessive, the defendant's remedy was by an application to the selectmen of Canaan for an abatement, and, in case they declined to grant it, to seasonably petition the court for a like purpose. By so doing, a hearing could be had and any error in the assessment corrected."

In still another case, *Larkin* v. *Portsmouth,* 59 N. H. 26, a petition for abatement was brought later than provided for by the statute. The plaintiff was taxed upon $3000.00, money at interest, Plaintiff had no money on hand, at interest or on deposit. It was held: "A plain and positive provision of law cannot be disregarded, even for the purpose of correcting gross injustice. Petition too late."

The New Hampshire Court has indicated several times an intention to include every possible situation involving recovery of moneys wrongfully collected within the scope of the statute. In very clear, concise language, it stated in *Rowe* v. *Hampton,* 75 N. H. 479: "Plaintiff's remedy is by petition in abatement. . . . even though the 'whole assessment is illegal'. It is not merely an adequate remedy, but the statute plainly indicates that it was *intended to be the only* available remedy for errors that can be corrected on appeal."

And this remedy is for the correction of errors of law or of fact. *School District* v. *Carr,* 63 N. H. 201

The City of Franklin submits that the New Hampshire Court not only did not intend to create an exception but deliberately undertook to make itself clear on the point that in cases whereby recovery for money wrongfully collected is sought, a petition in abatement is the only available remedy.

THAT THE ACTION WAS NOT MAINTAINABLE IN FEDERAL COURT; THAT THE CITY OF FRANKLIN HAD NOT CONSENTED TO BE SUED; THAT THE STATUTES DO NOT PROVIDE FOR SUITS AS PRESENTED IN THE INSTANT CASE

The right of the plaintiff to maintain this action in a Federal Court depends, first, upon whether the action is against an individual or against the State or a political sub-division thereof. Secondly, if the action is determined to be against the State or a political sub-division thereof, the question arises as to whether or not the State, or a political sub-division thereof, has consented to suit against itself in the Federal Court.

The complaint itself ascertains that the action is against the City of Franklin, hence, it is not against an individual. It must follow that this action is plainly distinguishable from those to recover personally from a tax collector money wrongfully exacted by him under color of state law. . . *Atchinson & Ry. Co.* v. *O'Connor,* 223 U. S. 280 (Colorado statute left the taxpayer to his remedy against the collector).

By its taxation statutes New Hampshire creates a judicial procedure for the prompt recovery by the citizens of money wrongfully collected as taxes. It is the sovereign's method of tax administration. The statutes designate what steps are to be taken for redress and it empowers the tribunal and courts to do complete justice by determining the amount properly due and directs the officials to pay back any excess or all of the tax received to the taxpayer. Thus the statute makes sure the taxpayer's recovery of illegal payments.

When a State authorizes a suit against itself to do justice to taxpayers who deemed themselves injured by any exactions, it is not consonant with our dual system for the Federal Courts to read the consent to embrace Federal as well as State Courts. The Federal Government's consent to suit against itself, without more, in a field of Federal power does not authorize a suit in a State Court. *Minnesota* v. *United States*, 305 U. S. 384, 389; the same reasoning may be applied to state's consent, in a field of state power (for instance collection of illegal taxes) as not authorizing suit in a Federal Court. The statute provides a complete procedure including a review by the Superior and Supreme Courts, as the case may be, which are given authority to affirm, modify or annul the action of the assessors. Therefore it becomes clear that the legislature of New Hampshire was consenting to suit in its own courts only. *Chandler* v. *Dix*, 194 U. S. 590. *Matthews* v. *Rodgers*, 284 U. S. 521.

As demonstrated in other parts of the brief, the New Hampshire Court has constructed the statutory remedy for the recovery of money wrongfully collected to be exclusive. The statute under construction also dictated the manner by which one aggrieved could recover and finally it designated, in cases where the officials neglected or refused to act, just what tribunal had jurisdiction of the cause. Unlike similar other statutes, the New Hampshire statute did not give the aggrieved party his choice of court such as "courts of jurisdiction"; it tersely said: "to the Superior Court in the county. . .". Thus the legislature intended to give jurisdiction only to its state court.

THAT THE PAYMENTS MADE BY THE RESPONDENT, COLEMAN BROS., CORPORATION, TO THE CITY OF FRANKLIN, WERE MADE VOLUNTARILY

The uncontradicted testimony reveals that Coleman Bros., Corporation were notified of its being taxed on August 1, 1940, for the year 1940 and on August 1, 1941, for the year 1941. Nearly four months lapsed before the taxes were paid in each year. There is no evidence of restraint nor of seizure. The Circuit Court of Appeals held that the provisions of the statutes constituted legal compulsion. [Transcript of Record pages 119, 120] This appears from the cases below to be in conflict with other circuit courts and also with decisions in the Supreme Court of the United States.

In a case in the eight circuit, *Security National Bank of Watertown, S. D.* v. *Young*, 55 Fed. (2) 616 the following appears:

> "The only claim of duress or coercion is that the payments involved were made through the coercion and duress of the South Dakota Statute. South Dakota Statute provided that, if the tax on personal property should not be paid when due, it should be collected through the sheriff, and that, in addition to other large and burdensome fees and mileage chargeable and collectible by the sheriff, there might be added to such taxes a penalty of 15% of the amount due. To hold that the provisions of the statute constituted a constructive duress or coercion would in effect render the payment of practically all taxes involuntary and subject to be recovered back. As said in *Phillips* v. *City of Portsmouth*, 115 Va. 180: 'To hold that imposition of a penalty which is designed to accelerate the prompt payment of taxes, constitutes a duress would be to render the payment of the great bulk of our taxes involuntary."

In *Mayor of Baltimore* v. *Liffermann*, 45 Am. Dec. 145, 153, it is said; "To rule allowing a party to recover money which he once paid, on the ground that it was paid under compulsion, is intended only for the relief of those who are entrapped by sudden pressure into making such payments and who have no means of escaping an existing or imminent infringement of their rights of person or property. Where a party has time and opportunity to relieve himself from his predicament without such a payment, by

a resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary, and he cannot recover it."

The following language is found in *Johnson* v. *Crook County,* 100 Pac. 294, "We believe that reason supports the rule that when a tax has been paid without compulsion but with comprehension of its invalidity, or with means of knowledge of its illegality, the liquidation is voluntary and prevents a recovery of the money disbursed, although the payment may have been made under protest . . . . It will be remembered that the complaint herein avers that the sheriff of Crook County obeying the command attached to the roll, notified the plaintiff that his land was taxed to the extent of $364.57, informed him that the exaction was just and due, and that unless the sum was paid he would 'in due time' collect by a sale of the property. It is nowhere alleged that the sheriff was either in the act of selling or that he threatened immediately to do so; or that the plaintiff, believing the menace would be instantly executed, was by the abrupt urgency insnared into meeting the payment, or that he had no other expedient of freeing his property from the lien which the levy of tax created." Payment held voluntary.

Payment of illegal taxes under protest before the taxes had become delinquent and without any demand or threat to levy, merely to prevent the imposition of a penalty and interest which would accrue on the succeeding day, was "voluntary", so that the taxes paid could not be recovered. *Cincinnati N. O. & T. P. R. Co.* v *Hamilton County,* 113 N. W. 361.

In another instance, the court (*San Francisco & N. P. RR Co.* v. *Dinwiddie,* 13 Fed. 789) held: "The assessment was claimed to be void, and it was on that ground that the plaintiff objected to the sale, and paid the money under protest. The means of knowledge of the plaintiff were equal to those of the tax collector. The plaintiff was bound to know the law. If the plaintiff paid where there was no actual seizure or restraint of its goods, merely from a fear that it might be mistaken in law, it acted upon its own judgment as to what was the best course to pursue. It was merely a question of policy not coercion. If there was a mistake

on its part, it was a mistake of law which it was bound to know, and not a mistake of fact. At all events the payment was clearly voluntary."

The Coleman Bros., Corporation in question is in no better position than the plaintiff in *R. R.* v. *Commissioner* (Neb.) 98 U. S. 541, 545. The court quoted part of *Preston* v. *Boston*, 12 Pick (Mass.) 14:

"When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he pays it by duress and not voluntarily, and by showing that he is not so liable, recover it back." The court continues on: "This we think, is the true rule, but it falls short of what it required in this case. No attempt has been made by the treasurer to serve his warrant. He has not personally demanded the taxes from the Company, and certainly nothing has been done from which his intent could be inferred to use the legal process he held to enforce the collection, if the alleged illegality of the claim had been made known to him. All that appears is, that the company was charged upon the tax lists with taxes upon its real and personal property in the county. After all the taxes had become delinquent under the law, but before any active steps whatever had been taken to enforce their collection, the company presented itself at the treasurer's office, and in the usual course of business paid in full everything that was charged against it, accompanying the payment, however, with a general protest against the legality of the charges and a notice that suit would be commenced to recover back the full amount paid. Three years after, and after the decision in *R. R.* v. *McShane* which was supposed to hold that the particular lands now in question were not subject to taxation, suit was brought . . . the payment was not compulsory in such a sense as to give a right to the present action."

In a case where it appeared that the assessment was wholly unwarranted by law and totally void, the court said, in *Detroit* v. *Martin*, 34 Mich. 110; "The plaintiff at the time he paid his tax, paid it with full knowledge of all the facts and circumstances.

He is conclusively presumed to know the law applicable thereto. He is presumed to have known at the time he paid this tax that the statute under which the assessment was made was void, and that a sale constituted no cloud. The threat was therefore a harmless one. It could not have affected the plaintiff as it could not have affected his rights. The assessment was a mere nullity and could not have been enforced in anyway. Yet the plaintiff knowing all of this voluntarily pays."

In a more recent case, *North Miami* v. *Seaway Corporation* (1942) 9 So. (2) 705, the question of payments came under consideration. The court there held: "All tax payments are presumed to be voluntary until the contrary is made to appear, and mere protest when payment is not made to save arrest or seizure or sale of goods does not relieve payment from its presumed voluntary character and does not permit recovery. Every man is presumed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it. Ignorance or mistake of law by one who voluntarily pays a tax illegally assessed furnishes no ground for a recovery. A mere protest when payment was not made to save arrest or seizure of goods, or a sale is in submission to process and it does not relieve the payment of its presumed voluntary character."

In another case *Gaar, Scott & Co.* v. *Shannon*, 233 U.S. 468, 471 the court in considering payments said: "Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment is treated as duress. It does not follow that there will be a levy on goods, or if there is, the citizen, to avoid the consequences of the levy, may pay the money, regain the use of his property and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong . . . ." But, it said an act which declares a (1) 25% penalty, (2) license of company shall be cancelled result in duress if payment is made thereunder if the act is subsequently declared void. The tax in question was a franchise tax required to do business in the State for 10 years. Plaintiff in its action had alleged that it only transacted *interstate* business. The act

applied to *intrastate* business. The court stated: "If therefore the plaintiff had been included in the class to which the statute applied and, under the duress of its automatically enforced provisions, had paid the tax to avoid the disruption of its business, it could have maintained an action to recover the amount thus exacted. In that suit it would have been entitled to a decision on the question as to whether the statute was constitutional and to a review of the judgment if it has been adverse to the company's contention. But the company did not in any sense come within the purview of the act. The plaintiff alleged that it was engaged only in interstate commerce. If so, the statute could not require from it the payment of the tax. The duress of its provisions therefore, operated only on those doing intrastate business; and if the plaintiff on a mere demand, paid the tax imposed by statute applicable only to other corporations, it had no more right to recover than would a dry goods merchant who voluntarily paid a tax illegally imposed on those engaged in the selling of liquor. To permit those not affected by a statute to pay the sum thereby assessed, and then sue for its recovery on the ground that the act was void, would reverse the rule that 'one who would strike down a State statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional'."

It is suggested that the holding of the court below is not in accord with the general line of cases and the same serve to create rather than to avoid conflict between courts of appeal and the state court.

THAT THE RESPONDENT, COLEMAN BROS., CORPORATION IS ESTOPPED BY ITS OWN CONDUCT AND IS THEREFORE GUILTY OF LACHES.

Holding that the Coleman Bros., Corporation seasonably brought its action is in direct conflict with the decisions of the Supreme Court of New Hampshire. The New Hampshire Court has held time and time and again that New Hampshire Revised Laws, chapter 77, sections 13, 14 is the only possible way one can recover taxes wrongfully collected. Said statute has placed

a time limitation within which an aggrieved party may obtain complete and adequate relief. If the entire tax is illegal, the assessment of it may be vacated as effectually as an erroneous decree or judgment can be reversed on an appeal or writ of error. *Edes* v. *Boardman,* 58 N. H. 580, supra.

The Coleman Bros, Corporation maintained from the beginning it was not subject to tax by the City of Franklin and furthermore said city had no jurisdiction whatever. Having paid the taxes for the two years the respondent corporation became dormant until the New Hampshire Court rendered a decision holding that personal property on government owned land was not taxable. *Scribner* v. *Wikstrom* (November 1943) 93 N. H. 17, 34A (2nd) 658. The respondent corporation's conduct is on all fours with *R.R.* v. *Commissioner* (Neb) 98 U. S. 541, supra, a situation where the plaintiff after having paid a tax under protest waited three years and after a certain decision favorable to it before bringing suit.

It is not necessary in New Hampshire to pay a tax in order to find out what a taxpayer's rights are . . . . there is a preventative remedy by making a petition for abatement. Having ignored this remedy although it had ample time within with so to file and having waited 3½ years with respect to the 1940 tax and 2½ with respect to the 1941 tax, Coleman Bros., Corporation should be estopped to assert whatever rights they might have had prior to the expiration of the limitation of time. This question is of great concern to the people of New Hampshire and in particular to the City of Franklin. To allow one to continue on after conducting himself as did the Coleman Bros., Corporation would tend to disrupt the taxation system in New Hampshire and also would lend itself to untold confusion, not forgetting also that it would contradict the judgment of the New Hampshire Supreme Court.

THE RESPONDENT IS NOT ENTITLED TO INTEREST.

An obligation of the State to pay interest, whether as interest or as damages, on any debt overdue, cannot arise except by the consent and contract of the State, manifested by statute, or in a form authorized by statute. *United States* v. *North Carolina,* 136 U. S. 211, 221.

Also, since a taxpayer's right to a refund of taxes wrongfully collected can be enforced only under the statutory remedy therefor and subject to its conditions and restrictions (*Rowe* v. *Hampton*, 75 N. H. 479); (*Bartlett* v. *New Boston*, 77 N. H. 476), he is entitled to interest on such refund only as the statute authorizes it. *Kaemmerling* v. *State*, 81 N. H. 405, 406. There is no provision under New Hampshire Revised Laws Chapter 77, sections 13 and 14 for any interest.

CONCLUSION.

Thus the cases decided by the Supreme Court of New Hampshire clearly indicate that the statutory remedy for the recovery of moneys wrongfully collected as taxes is exclusive and that there are no other available remedies; whereas the United States Circuit Court of Appeals for the First Circuit in effect imposes an exception to an established rule which cannot be traced to any statute nor to any decision.

The authorities cited with respect to the character to be given to payments seems and does conflict with the finding of the United States Circuit Court of Appeals for the first Circuit.

Finally it is submitted this case is of great public interest and importance to the citizens of the State of New Hampshire. Therefore this fact together with the apparent conflict between the Supreme Court of New Hampshire and the Circuit Courts of Appeals seems to your petitioner, the City of Franklin, of sufficient importance to warrant the granting of the writ of certiorari.

City of Franklin

By .....

F. A. Normandin
489 Main Street
Laconia, N. H.

Lawrence J. Bernard
John E. Shea
Washington 6, D. C.
1025 Connecticut Ave., N. W.

INDEX

CITATIONS

CASES:

STATUTES:

In the Supreme Court of the United States

OCTOBER TERM 1945

No. 1119

CITY OF FRANKLIN, PETITIONER

v.

COLEMAN BROS. CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR COLEMAN BROS. CORPORATION IN OPPOSITION

OPINIONS OF THE COURT

The City of Franklin by its petition for *certiorari* seeks to have reviewed the order or judgment of the Court of Appeals for the First Circuit affirming the judgment of the District Court awarding the respondent Coleman Bros. Corporation damages in the sum of twelve thousand two hundred fifty-seven dollars ($12,257) with the proviso that interest be added thereto and included in the final judgment. The opinion of the District Court is reported in 58 Fed. Supp. 551 and of the Court of Appeals in 152 Fed. 2d 527.

JURISDICTION

The respondent, Coleman Bros. Corporation, filed its complaint in United States District Court for the District of New Hampshire on May 17, 1944 to recover back money paid under protest to the petitioner, City of Franklin, for taxes alleged to have been illegally assessed in 1940 and 1941. Coleman Bros. Corporation is a corporation organized under the laws of the Commonwealth of Massachusetts with its principal place of

business at Boston, and the City of Franklin is a municipal corporation organized under the laws of the State of New Hampshire. The judgment of the District Court was entered on December 2nd, 1945. The City of Franklin appealed from the judgment on the ground that it was entitled to judgment as a matter of law and the Coleman Bros. Corporation for the reason that interest was not allowed on the damages recovered. The judgment of the United States Court of appeals was rendered December 13, 1945 and on March 13, 1946 an order was entered in this Court extending the time within which to file the petition for certiorari to and including April 15, 1946. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the act of February 13, 1925.

THE QUESTIONS PRESENTED

The petitioner, City of Franklin, contends that the United States Court of Appeals for the First Circuit erred in rejecting the petitioner's contentions that,—

I. The statutory remedy (N. H. R. L., Ch., 77, Sects. 13, 14) for abatement of taxes is exclusive.

II. The action is not maintainable because the City of Franklin does not consent to be sued, and because the statutes do not provide for suits as presented in the instant case.

III. The payments made by the respondent, Coleman Bros. Corporation, to the petitioner, City of Franklin, were made voluntarily.

IV. The respondent, Coleman Bros. Corporation, is guilty of laches.

V. The respondent, Coleman Bros. Corporation, is not entitled to interest.

STATUTES INVOLVED

The pertinent provisions of the New Hampshire statutes relating to the assessment, abatement and collection of taxes (R. L., Ch. 74, Sects. 1, 3; Ch. 75, Sects. 1, 6, 13; Ch. 77, Sects. 11, 13, 14; Ch. 80, Sects. 4, 6, 8) are set out in the appendix. Other statutes, State and Federal, are referred to in the brief.

STATEMENT OF THE CASE

The petitioner, City of Franklin as of April 1, 1940 assessed taxes against Coleman Bros. Corporation in the sum of $7,700, and as of April 1st, 1941 in the sum of $4,557, for machinery and equipment situated on land acquired by the United States for the Franklin Falls Flood Control Project. The Congress by the Flood Control Act of 1936 (49 Stat. 1570) and the amendment thereto, enacted June 28, 1938 (52 Stat. 1216) authorized the construction of "a system of flood control reservoirs in the Merrimack River Basin," and specifically the construction of a flood control dam and reservoir at Franklin Falls on the Pemigewasset River, an important tributary of the Merrimack River. The State of New Hampshire to open the way for the construction of these projects (Laws 1939, Ch. 149, Sect. 1) gave consent "in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, to the acquisition by the United States by purchase, condemnation or otherwise, of any land or interests in land within this state required for use in connection with the construction, maintenance and operation of" various flood control projects, including the Franklin Falls Reservoir, subject only to the provision that the State "shall retain concurrent jurisdiction with the United States in and over any such lands to the extent that all civil and criminal process issued under the authority of this state may be executed thereon ***." (R. L. Ch. 4, Sect. 1.)

Coleman Bros. Corporation under a written agreement dated September 6, 1939 undertook the construction of the flood control dam at Franklin Falls and were assigned a work area, including the dam site, consisting of nine tracts or parcels of land to which the United States had acquired title. Within this work area the plaintiff constructed prior to April 1, 1940 an office building and repair shop and other structures, and also an enclosure set off by a wire fence in which its equipment was stored when not in use. On April 1, 1941 the plaintiff was still engaged in construction of the dam within the work area but the quantity of equipment had been reduced. Coleman Bros. Corporation, a foreign corporation, had no place of business within the confines of New Hampshire except upon this flood control reservation. (R. 102-4).

This reservation is within the bounds of the City of Franklin and on April 1, 1940, Mr. Gerry, one of defendant's assessors, called at the office and left with the manager the usual form for inventory of taxable property requesting that it be filled out and returned to the assessors. Instead the form was forwarded to the Boston office from which it was returned to the assessors with a letter under date of May 2nd stating that the property was not taxable. Thereupon, the State Tax Commission by letter dated May 3rd notified Coleman Bros. Corporation that its property was taxable and that it must return an inventory. Mr. Gerry again called for the inventory but was put off. He returned again on May 16th and was shown the buildings and equipment. Finally, an inventory was returned listing property to the value of $200,000 with a letter denying the jurisdiction of the assessors to impose the tax for the reason that the property "is on land owned or controlled by the United States of America." (R. 107). The tax inventory also contained the following protest,—

> "This return is made to avoid any possible penalties and protesting against the levying of any taxes as this property is not subject to taxation in Franklin." (Ex. 18).

The assessors notwithstanding this protest assessed taxes against the plaintiff aggregating $7,700 and in due course issued a warrant to the tax collector for the collection of this and other taxes. The tax collector in August 1940 notified the Coleman Bros. Corporation of the tax, and demanded payment (R. 110). The tax was paid under protest on November 22nd. The protest among other things stated,—

> "This payment is made under protest and for the purpose of saving the company from any penalties, the personal property on which the tax was levied being located on real estate which is the property of the United States and said personal property not being taxable by said City, and we hereby expressly disaffirm and deny any right of said City to tax said property." (R. 108, Ex. 19A)

In the following year, 1941, this procedure was repeated. The assessment against the Coleman Bros. Corporation amounted

to $4,557 which was paid under protest as of November 17th, 1942. (R. 108-10).

In 1942 the assessors again demanded that the respondent file an inventory of its property and an inventory was again filed under protest. However, the inventory was returned by the assessors with a letter dated May 14th, 1942, stating that they had been advised by the Tax Commission that,—"New Hampshire did not protect itself when they gave the federal government the right to acquire property by reserving to itself the right to tax." (Ex. 27A; R. 77).

The District Court found that the property of the Coleman Bros. Corporation had its situs within the flood control reservation and that the City of Franklin was without jurisdiction to levy a tax thereon. (58 F. Supp. 553). The District Court also found,—

> "The testimony tended to show and I find as a fact that the plaintiff complied with the requests of the assessors of the City of Franklin in filing its inventory and paying the taxes assessed prior to December 1 each year under protest to avoid the penalties prescribed in Chapter 75, section 13, of N. H. R. L., relating to doomage, the payment of ten per cent interest or the possible distraint and sale of its property as prescribed in Chapter 80 of the N. H. R. L." (58 F. Supp. 553).

The District Court held that the Coleman Bros. Corporation is entitled to recover the amounts paid to the City of Franklin, a total of $12,227, but without interest.

ARGUMENT

In *Scribner* v. *Wikstrom*, 93 N. H. 17 the Court in construing Laws 1939, Ch. 149, Sect. 1 (R. L., Ch. 4, Sect. 1) declared that,—"Reservation of the power to serve process does not imply a reservation of the power to tax." The petitioner, City of Franklin, now concedes that it had no jurisdiction to tax the personal property belonging to Coleman Bros. Corporation and having its situs upon land belonging to the United States. *Surplus Trading Co.* v. *Cook*, 281 U. S. 647. The City of Franklin thus admits that the taxes were illegally

assessed but contends that the respondent, having paid the taxes, cannot maintain this action to recover back its money. This contention is elaborated in several propositions advanced in support of this petition. (Pet. 5). These contentions involve primarily questions of New Hampshire law and procedure and will be considered in the order stated in the petition.

I. *The Statutory Remedy for Abatement of Taxes Is Not Exclusive Where the Taxes Are Assessed Without Jurisdiction of the Person or Property.* The respondent did not petition under Revised Laws, Chapter 77, Sects. 13 and 14 for abatement of the taxes assessed against it. Section 13 authorizes the selectmen or assessors upon written application for a good cause shown to abate any assessments assessed by them. Section 14 provides that upon neglect or refusal "to abate, any person aggrieved * * * may within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires." This remedy is usually invoked for over-assessment or other irregularity and the relief may include judgment for such portion of the taxes paid as may have been improperly assessed. *Rollins* v. *Dover,* 93 N. H. 448. In cases involving only over-assessment, the statutory remedy is exclusive. *Edes* v. *Boardman,* 58 N. H. 580. It is not exclusive where the assessment is made without jurisdiction of either the person or the property against which the tax is assessed. In the present case the District Court found that the property taxed "had its situs on land belonging to the United States," and ruled that "the assessors of the City of Franklin had no jurisdiction over the plaintiff corporation or its property." (58 F. Supp. 551). The assessments were made without jurisdiction and were therefore void. *Wynn* v. *Boston,* 281 Mass. 245; 183 N. E. 528. Thus in *Winchester* v. *Stockwell,* 75 N. H. 322, where the Town sought to recover taxes assessed against real estate situated within the Town but belonging to a resident of Vermont, the assessment was held invalid as a judgment *in personam,* the Court said,—

> " 'A judgment without service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or other tribunal in an ordinary action to enforce a personal

> liability, and no jurisdiction is thereby acquired over the person of a non-resident further than respects the property so taken. This is as true in the case of an assessment against a non-resident of such a nature as this one, as in the case of a more formal judgment. The jurisdiction to tax exists only in regard to persons and property or upon business done within the state and such jurisdiction cannot be enlarged by reason of a statute which assumes to make a non-resident personally liable to pay a tax of the nature of the one in question.' *Dewey* v. *Des Moines,* 173 U. S. 193, 203."

In the present case jurisdiction was lacking, not only over the person but also over the property. The assessment was not valid either as a judgment *in personam* or *in rem*. In *Surplus Trading Corporation* v. *Cook,* 281 U. S. 647, upon facts analogous to the present case the assessment was held invalid. The action was brought by Cook as tax collector for Pulaski County, Arkansas, to collect taxes assessed against personal property stored upon a military reservation. Among other contentions, Cook maintained that as the Trading Corporation had failed to apply for abatement to the State Board of Equalization "as required by Act 477 of Acts of Arkansas for 1919," "the courts are powerless to give * * * any relief." (281 U. S. 648). In rejecting the respondent's various contentions, this Court said,—

> "The property attempted to be taxed consisted of a large quantity of woolen blankets which the defendant, a New York concern, purchased from the United States at an advertised sale a few days before the day fixed by the state law for listing personal property for taxation, and which in much the greater part was on that day in the army storehouses within Camp Pike awaiting shipment therefrom. (281 U. S. 650).
>
> * * * * * * *
>
> "The question is not an open one. It long has been settled that where lands for such a purpose are purchased by the United States with the consent of the state legislature the jurisdiction theretofore residing in the state passes, in virtue of the constitutional provision,

to the United States, thereby making the jurisdiction of the latter the sole jurisdiction. (281 U. S. 652).

* * * * * *

"For the reasons which have been stated we are of opinion that the supreme court of the state erred in holding that her tax laws could be applied to personal property within Camp Pike consistently with s. 8, cl. 17, of article 1 of the Constitution, and therefore that the judgment of that court must be reversed." (281 U. S. 657).

The New Hampshire statutes do not authorize the assessment of taxes against persons or property without the jurisdiction. The cases, *Nottingham* v. *Company,* 84 N. H. 421, *Canaan* v. *Enfield Village Fire District,* 74 N. H. 8 and *Larkin* v. *Portsmouth,* 59 N. H. 26, relied upon by petitioner, are distinguishable upon the facts. However, if these statutes were held to apply either to the respondent while doing business upon the flood control reservation or to its personal property while situated there, the statutes might be deemed repugnant to s. 8, cl. 17 of article 1 of the Federal Constitution. But the statutes have not been construed to extend so far, and this question is not presented. The authorities are clear that the statutory proceeding for abatement is not the exclusive remedy when as here there was no jurisdiction to impose any tax. The general rule that the statutory remedy must be invoked does not apply where the assessment is void. The law is clearly stated and the authorities marshalled in the opinion of the court below. See, *City of Franklin* v. *Coleman Bros. Corp.,* 152 F. (2d) 527, 530.

II. *The Action Is Maintainable Although the City of Franklin Has Not Consented to Be Sued and the Statutes Do Not Expressly Authorize Such Actions.* The petitioner as a municipal corporation and a sub-division of the State of New Hampshire claims immunity to suit without express statutory authorization. But the immunity of the state to suit does not extend to cities and towns. Actions *ex contractu* and *ex delicto* have been maintained against cities and towns, subject only to limitations arising out of their peculiar powers. In no case has an action *ex contractu* been dismissed because of immunity

to suit. In *Rhobidas* v. *Concord,* 70 N. H. 90, the Court, in rejecting defendant's contention that it shared the immunity of the state to suit, after reviewing the decisions, said,—

> "If towns were mere divisions of the state, and could not be sued without authority from the legislature, many of these actions would have failed."

See also, *Lucier* v. *Manchester,* 80 N. H. 361.

No statutory authority is necessary to maintain this action to recover money illegally extorted by the petitioner from the respondent. The money was had and received by petitioner under circumstances giving rise to an implied promise to repay. *Eaton* v. *Noyes,* 76 N. H. 52. The petitioner ought not to be allowed to profit by its own wrong.

III. *The Payments Made by Coleman Bros. Corporation to the City of Franklin Were Not Voluntary.* This contention, like the other contentions raised by the petitioner, was exhaustively considered by the court below. The District Court found that the respondent filed its inventory and paid the tax prior to December each year under protest "to avoid the penalties prescribed in Ch. 75, Sect. 13 * * * relating to doomage and the payment of ten per cent interest or the possible distraint and sale of its property." (58 F. Supp. 551). The provisions of New Hampshire Revised Laws, Chapter 75, were printed in full upon the back of the form for inventory presented by the petitioner's assessors to the respondent. Section 13 of Chapter 75 provides that "if any person or corporation shall wilfully omit to make and return such inventory * * * the selectmen or assessors shall ascertain, in such way as they may be able, and as nearly as practicable, the amount and value of the property for which the person or corporation is taxable, and shall set down to such person or corporation, by way of doomage, four times as much as such property would be taxable if truly returned and inventoried." The respondent filed each inventory only upon the insistence of petitioner's assessors and with knowledge of the risks involved if they failed to comply with the demand. This clearly appeared from the protest and accompanying letter, denying jurisdiction and stating that the return or inventory was filed "to avoid any possible pen-

alties." (R. 70, Ex. 18). The taxes were paid under protest in November each year, after notice from the tax collector. (R. 110). In each protest the respondent denied the authority of the petitioner to levy the tax and stated that the tax was paid "for the purpose of saving the Company from any penalties." (R. 108). Interest at the rate of ten per cent per annum from December 1st was automatically imposed by the statute as a penalty for non-payment. (R. L., Ch. 77, s. 11). The property of non-residents is subject to distraint by the tax collector without notice. (R. L., Ch. 80, s. 4). The tax collector, under the power reserved to the state to serve civil and criminal process (R. L., Ch. 4, s. 1) could enter upon the federal reservation and distrain respondent's property. Each warrant issued to the tax collector directed him to collect the taxes according to the list annexed thereto, which included the taxes assessed against the respondent and specifically commanded him if any person or corporation after written notice of the tax neglected or refused "for the space of fourteen days to pay such tax" "to collect the same by distress and sale of the goods of such person or corporation." See, copies of tax warrants filed as exhibits. The petitioner at all times evinced a purpose to collect the tax. The finding of the District Court that the respondent filed the inventories and paid the taxes to avoid the penalties "relating to doomage and the payment of ten per cent interest, or the possible distraint and sale of its property," is fully warranted by the evidence. The result reached in this case legally follows. *Kirchner* v. *Pittsfield,* 312 Mass. 342, 44 N. E. 2d 634; *National Metal Edge Box Co.* v. *Readsboro,* 94 Vt. 405, 111 Atl. 387. This Court has repeatedly held that where taxes are paid "not voluntarily but under legal compulsion," they may be recovered back if illegally assessed, in appropriate proceedings. *Atchison, T. & S. F. R. Co.* v. *O'Connor,* 223 U. S. 285.

IV. *The Respondent, Coleman Bros. Corporation, Is Not Estopped by Its Own Conduct or Guilty of Laches.* The respondent has maintained a consistent course throughout the proceedings resulting in this action. The petitioner, having illegally extorted money from the respondent, cannot be heard to complain of the delay in instituting suit for it could

at all times have corrected the situation by returning the money. The petitioner's assessors were advised in 1942 that they did not have authority to assess respondent's property, but the petitioner apparently took the view that the respondents could not recover back the moneys paid because the statutory remedy by petition for abatement was exclusive (R. 78) and has persisted in this position to the present time. The suggestion that in New Hampshire it is unnecessary "to pay a tax in order to find out what a taxpayer's rights are" (Pet's. Brief 13) cannot be accepted literally. While a taxpayer may apply for abatement of taxes at any time within six months after notice of the tax, he is liable for interest at the rate of ten per cent, if the tax is held valid. Furthermore, the filing of the petition for abatement does not relieve the tax collector from the mandate contained in the warrant to collect the tax. The duty imposed upon the tax collector to collect the taxes committed to him is not only mandatory, but the distraint must be made within one year from October first following the assessment. (R. L. Ch. 80, Sect. 6). The tax collector cannot legally await the outcome of proceedings for abatement but must proceed with the collection of the tax and, if necessary, by distraint. This he would most certainly have done in the case of respondent whose property was gradually being moved beyond his reach. The respondent, irrespective of the proceedings instituted to determine the validity of the tax, had no choice but to pay the tax or face the distraint of its property for non-payment. We submit that the defense of laches is without merit.

V. *The Respondent Coleman Bros. Corporation Is Entitled to Interest.* The petitioner has advanced no good reason why it should not pay interest upon the money wrongfully collected from the respondent. It has had the use of the money and should pay for it. Interest has uniformly been allowed at six per cent (R. L., Ch. 367, s. 1) on taxes paid under protest and recovered back. The rule was declared in *Boston & Maine Railroad* v. *State*, 63 N. H. 571, and *Amoskeag Mfg. Co.* v. *Manchester*, 70 N. H. 348, and has been followed without question in numerous cases, including *Phillips Exeter Academy* v. *Exeter*, 92 N. H. 473 and *Sisters of Mercy* v. *Hooksett*, 93

N. H. 301. The form of the proceeding to recover back taxes paid under protest does not affect the right to interest as the legal and equitable considerations are not changed.

There is no conflict between the decision of the Court of Appeals and the decisions of the New Hampshire Supreme Court. The decision is in conformity with the interpretation placed upon the statutes by the New Hampshire Supreme Court in *Scribner* v. *Wikstrom,* 93 N. H. 17 and other cases, and also is consistent with the provisions of section 8, clause 17, Article 1 of the Federal Constitution. We respectfully submit that the petition for *certiorari* ought to be denied.

Respectfully submitted,

ROBERT W. UPTON,
Attorney for Respondent.

APPENDIX

Pertinent provisions of the New Hampshire Revised Laws relating to the assessment, abatement and collection of taxes.

Ch. 74, Sects. 1, 3.

"1. RESIDENTS. Every person shall be taxed in the town in which he is an inhabitant or resident on April first, for his poll and estate, except in cases otherwise provided by law.

"3. CORPORATION PROPERTY. Taxable property of corporations, and property taxable to corporations shall be taxed to the corporation by its corporate name, in the town in which it is located, except where other provision is made."

Ch. 75, Sects. 1, 6, 13.

"1. ANNUAL LIST. The selectmen of each town shall annually, in April, make a list of all the polls and take an invoice of all the estate liable to be taxed in such town on the first day of that month.

"6. RETURN OF INVENTORY. Every person and every corporation, by its president or other principal officer, shall fill out the blank inventory in all respects according to its requirements, and subscribe and make the required oath thereto before some justice of the peace or a selectman or assessor, either of whom is empowered to administer the same, and shall deliver, or, in case of non-resident persons or corporations, mail such inventory to the selectmen or assessors on or before April fifteenth of that year.

"13. DOOMAGE. If any person or corporation shall wilfully omit to make and return such inventory, or to answer any interrogatory therein contained, or shall make any false statement therein; or if the selectmen or assessors shall be of opinion that the inventory returned does not contain a full and correct statement

of the property for which the person or corporation is taxable; or that the person making the same has wilfully omitted to give required information, or has made false answers or statements therein, the selectmen or assessors shall ascertain, in such way as they may be able, and as nearly as practicable, the amount and value of the property for which the person or corporation is taxable, and shall set down to such person or corporation, by way of doomage, four times as much as such property would be taxable if truly returned and inventoried."

Ch. 77, Sects. 11, 13, 14.

"11. INTEREST. Interest at ten per cent shall be charged upon all taxes not paid on or before December first, after their assessment, from that date, which shall be collected with the taxes as incident thereto.

"13. BY SELECTMEN. Selectmen, for good cause shown, may abate any tax assessed by them or by their predecessors. All applications for abatement shall be in writing.

"14. BY COURT. If they neglect or refuse so to abate, any person aggrieved, having complied with the requirements of chapter 75, may, within six months after notice of such tax, and not afterwards, apply by petition to the superior court in the county, which shall make such order thereon as justice requires."

Ch. 80, Sects. 4, 5, 6, 8.

"4. NOTICE TO PERSONS. The collector shall give notice of such tax to every person taxed, or leave a notice thereof in writing at his abode, fourteen days at least before he shall distrain therefor, unless in cases where he has reason to believe such person is about to remove from town. But no notice of the tax shall be necessary under this section if the tax is against a person who is not an inhabitant of the state, or if the person against whom the tax was assessed has removed from the town.

"6. DISTRAINT. Upon neglect or refusal of any person or corporation to pay the taxes assessed upon them, the collector may distrain the goods and chattels of such person or corporation. Such distraint shall be valid only if begun within one year from October first following the assessment.

"8. DISTRAINT: PROCEDURE. The collector shall keep the property distrained four days at the cost of the owner. If the tax, cost and charges are not then paid he shall post, in two or more public places in the town where the sale is to be, twenty-four hours before the time of sale, a notice of the place, day and hour of sale, with a particular description of the property to be sold; and at the time and place appointed, which shall be in the town where the distress is made, between the hours of ten in the forenoon and six in the afternoon, and within forty-eight hours after the expiration of said four days, he shall sell the same at auction."